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“EXAMINATION OF FEMA’S LIMITED ROLE IN LOCAL LAND-USE  
DEVELOPMENT SYSTEMS”

Submitted By

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## **Introduction**

Good morning Chairman Shuster, Ranking Member DeFazio, and Members of the Committee. My name is Michael Grimm and I am the Assistant Administrator for Mitigation for the Federal Emergency Management Agency (FEMA). Thank you for the opportunity to testify about FEMA's efforts to strengthen our National Flood Insurance Program (NFIP) compliance with the Endangered Species Act (ESA) of 1973 (Pub. L. No. 93-205, codified at 16 U.S.C. § 1531 et seq.) in Oregon, as well as associated implications for the program nationwide.

Under section 7 "Interagency cooperation" of the ESA, (16 U.S.C. 1536) all Federal agencies are required to consult with the Department of Commerce's National Oceanic and Atmospheric Administration's National Marine Fisheries Service (NMFS) or the Department of Interior's U.S. Fish & Wildlife Service (FWS) (collectively, the Services) to ensure that any action authorized, funded, or carried out by such agency is not likely to jeopardize the continued existence of any endangered or threatened species, or result in the destruction or adverse modification of the critical habitat of such species, unless such agency has been granted an exemption. FEMA agreed to initiate formal consultation with NMFS on the implementation of the NFIP in Oregon based on litigation brought by the Audubon Society of Portland. As required in consultation, FEMA submitted a Programmatic Biological Assessment (PBA) to NMFS in 2011 to assess the effects, if any, that the implementation of the NFIP in Oregon had on 16 endangered or threatened salmon and steelhead species, as well as eulachon and Southern Residence killer whales and their habitats. FEMA's PBA determined that the implementation of the NFIP was "Not Likely to Adversely Affect" these ESA-listed species or their habitats.

After many years of inter-agency discussions and coordination, on April 14, 2016, NMFS issued a Biological Opinion that determined the implementation of the NFIP in Oregon was likely to jeopardize the continued existence of endangered or threatened species and result in the adverse modification of the critical habitats of such species. When a jeopardy opinion is issued, NMFS must also provide Reasonable and Prudent Alternatives (RPA), if any, to the proposed action. In this case, the RPA is a recommended set of program changes that will ensure the NFIP is implemented in a manner that will not jeopardize the continued existence of endangered or threatened species or result in the adverse modification of the critical habitats of such species.

## **National Flood Insurance Program**

Before discussing how the ESA interacts with the NFIP and FEMA's relationship to local land-use systems, it is important to explain some of the basic elements of the NFIP.

Flooding continues to be the single greatest source of damage from natural hazards in the United States, causing about \$8 billion in property damage annually. Congress established the NFIP as a voluntary Federal program through which property owners in participating communities can purchase Federal flood insurance as a protection against flood losses. In exchange, participating communities must enact local floodplain management regulations that meet or exceed FEMA's program requirements for floodplain development, which are intended to reduce flood risk and flood-related damages. In addition, FEMA identifies and maps the nation's floodplains so that areas of risk are discernible by planners, developers, and the public. Maps depicting flood hazard information are used by FEMA to promote broad-based awareness of flood hazards, provide data

for rating flood insurance policies, and determine the appropriate minimum floodplain management criteria for flood hazard areas.

Today, more than 22,000 communities participate in the NFIP, with more than 5.1 million flood insurance policies in effect, providing over \$1.2 trillion in flood insurance coverage. The NFIP serves as the foundation for national efforts to reduce the loss of life and property from flood disaster, and FEMA estimates that the program saves the nation \$1.9 billion annually in avoided flood losses.

## **Floodplain Management**

The power to regulate floodplain development, including requiring and approving permits, inspecting property, and citing violations, requires land-use authority. This falls under a state's Police Powers, which the Constitution reserves to the states, and the states delegate this power to their respective political subdivisions.

Congress found that a unified national program for floodplain management was an essential element of an effective NFIP. Therefore, Congress authorized FEMA to “develop comprehensive criteria designed to encourage, where necessary, the adoption of adequate state and local measures which, to the maximum extent feasible, will constrict the development of land which is exposed to flood damage where appropriate, guide the development of proposed construction away from locations which are threatened by flood hazards, assist in reducing damage caused by floods, and otherwise improve the long-range land management and use of flood-prone areas.”

FEMA's floodplain management role under the NFIP is limited to enrolling communities in the NFIP when a community has adopted adequate floodplain management regulations consistent with Federal criteria, establishing minimum floodplain management criteria, providing programmatic monitoring and oversight, offering technical assistance to ensure that communities are complying with the NFIP program requirements, and enforcing the program requirements when there are issues of programmatic non-compliance by a participating community.

## **Mapping**

Through its national flood mapping program, FEMA identifies flood hazards, assesses flood risks, and collaborates with states and communities to provide accurate flood hazard and risk data to guide them to mitigation actions. The National Flood Insurance Act (NFIA) requires that FEMA identify flood-prone areas and subdivide them into flood risk zones to provide the data necessary for FEMA to determine the appropriate minimum floodplain management criteria and to rate flood insurance policies. While a variety of flood zones are mapped on Flood Insurance Rate Maps (FIRMS), the NFIP's regulatory authority is the 100-year flood zone. Mapping of flood hazards promotes public awareness of the degree of hazard within such areas and provides for the expeditious identification and dissemination of flood hazard information. FEMA maintains and updates data through flood insurance studies and resultant FIRMs and Flood Insurance Study (FIS) Reports.

FEMA is required by statute to revise and update flood hazard maps to carry out its responsibility to ensure that the flood risk information presented is scientifically and technically correct: (a) upon

a determination that such revision or updates are necessary; or, (b) upon request from any state or community if accompanied by technical data sufficient to justify the requested change. To assess flood hazards in a community, FEMA conducts FISs and publishes FIS reports that describe the flood hazards for the community. FEMA uses the information developed in the FIS to prepare FIRMs. FEMA publishes the FIRM for distribution to a wide range of users including private citizens, community officials, insurance agents and brokers, lending institutions, and other Federal agencies. The FIRM is the basis for the floodplain management, insurance, and mapping activities of the NFIP.

### **Community Rating System**

Through its Community Rating System (CRS), FEMA recognizes and rewards community floodplain management activities that exceed the minimum NFIP standards. The CRS uses a class rating system to determine flood insurance premium reductions for residents. As a community engages in additional mitigation activities, community residents become eligible for a higher class, and thus additional discounts on NFIP policy premiums. The CRS recognizes 90 creditable activity elements, organized into four categories: Public Information, Mapping and Regulations, Flood Damage Reduction, and Flood Preparedness. Currently, there are a total of 1,391 NFIP communities that participate in the CRS and receive discounts for higher standards that protect their community against future flooding; 27 of these communities are in Oregon.

FEMA's CRS credit system primarily rewards flood loss reduction activities. FEMA also has authority to provide credit for activities that preserve natural floodplain functions and resources, as these activities also reduce flood-related losses. The CRS program illustrates that sound floodplain management for risk reduction often goes hand-in-hand with responsible environmental stewardship.

### **ESA Consultations**

Under section 7 of the ESA, all Federal agencies are required to consult with the Services to ensure that any action that is authorized, funded, or carried out by that agency is not likely to jeopardize the continued existence of threatened or endangered species or result in the destruction or adverse modification of the critical habitat of such species.

In response to lawsuits brought under the ESA, FEMA has been required, either by the courts or through settlement agreements with the plaintiffs, to undertake consultations under the ESA on the implementation of the NFIP in particular communities or regions. In consultations undertaken in Monroe County, Florida, the Puget Sound region of Washington State, and Oregon, the Services have found that the implementation of the NFIP in those areas was likely to jeopardize the continued existence of threatened and endangered species and adversely modify designated critical habitat.

During the Puget Sound consultation in Washington State, FEMA worked closely with NMFS, the state, communities, and stakeholders to implement the RPA that resulted from the Biological Opinion in that region. NMFS's Puget Sound RPA was written in a manner that would accommodate performance-based standards, which provided communities flexibility to implement an approach to preserve ESA-listed species and their designated critical habitat in a manner that is

consistent with local decisions on land use. Some Puget Sound communities have expressed concerns with the implementation of the Puget Sound RPA.

FEMA appreciates the dialogue it engaged in with NMFS as we coordinated efforts to reach an optimal outcome in the Oregon consultation. During consultation, FEMA recommended that the Oregon RPA follow the Puget Sound performance-based standard approach, giving FEMA and communities flexibility for determining how species and habitat can be protected. Ultimately, based on its experience in Washington, NMFS issued an RPA that differs from the Puget Sound performance-based standard approach, following a clearer, more prescriptive approach instead. If implemented as written, the RPA would result in an expansion of the areas mapped within the SFHA to include areas likely to flood based on data reflecting the anticipated impacts of climate change, and will require enhanced regulatory floodplain management criteria, going beyond the minimum standards currently required as a condition of NFIP eligibility. The agencies continue to work through methodologies to implement the RPA in a manner that is consistent with FEMA's operation of the NFIP, and which will reduce impacts to natural and beneficial functions of floodplains, such as safely storing and conveying floodwater, recharging streams through the hyporheic zone, and forming habitat areas for listed species.

### **Path Forward in Oregon**

Under the ESA, Federal agencies must utilize their legal authorities for the benefit of endangered species. As such, FEMA is looking comprehensively at the NFIP to determine how to ensure continued compliance with the ESA. FEMA will work to implement all the RPA requirements that it has the legal authority to implement. To the extent we determine that particular RPA requirements are outside the scope of FEMA's authority to implement, we will explore and implement alternatives to accomplish the purposes of those RPA provisions.

FEMA believes that implementation of a number of the RPA requirements and conservation recommendations will further the goals of both the NFIP and the ESA. FEMA is and will continue to be committed to working with our stakeholders, including the NMFS, the Oregon Department of Land Conservation and Development (DLCD), NFIP-participating communities, tribal nations, and others, to implement an ESA-compliant NFIP in the State of Oregon within our legal authorities.

Please be assured that no enforcement actions will be taken against any participating Oregon communities for failure to comply with the Oregon RPA interim requirements until after FEMA issues guidance next year on how communities can comply.

### **Path Forward Nationally**

FEMA is concerned about our ability to maintain uniform implementation of the NFIP nationwide amid multiple RPAs in different areas of the country. The combination of the five concluded consultations (Monroe County, New Mexico, Puget Sound, Oregon, and Arizona) with the two consultations in process (San Joaquin/Sacramento Delta, California, and Florida) means that there is inconsistent national implementation of the NFIP across the nation instead of a unified and consistent national program. The outcome of each consultation brings changes to the implementation of the NFIP.

FEMA will do everything within our authorities granted by Congress to administer the NFIP to reduce flood risks, first and foremost, while supporting the complementary responsibility of environmental stewardship. To that end, FEMA has undertaken a national assessment of the NFIP to consider its potential environmental impacts as modified by recent legislation and other proposed program modifications. The purpose for the proposed modifications to the NFIP is to implement legislative requirements of the Biggert-Waters Flood Insurance Act of 2012, and the Homeowner Flood Insurance Affordability Act of 2014, and to demonstrate compliance with the ESA.

FEMA and the Services have different primary missions and priorities, but we share the common obligation of species conservation under the ESA. Healthy floodplains reduce risk of loss of life and property, and benefit threatened and endangered species. Decisions and actions that are beneficial for wildlife habitat and floodplains can also be good for hazard reduction and community resilience.

Again, thank you for the opportunity to testify today, and I look forward to any questions that the committee may have.